

Original filed 3/1/07

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CARMEN ROY MALDONADO, JR.,)
)
 Petitioner,)
)
 vs.)
)
)
)
 SAN BENITO COUNTY SUPERIOR)
 COURT,)
)
 Respondent.)
 _____)

No. C 06-5560 JF (PR)

ORDER OF DISMISSAL
WITH LEAVE TO AMEND

Petitioner, proceeding pro se, filed the instant habeas corpus petition pursuant to 28 U.S.C. § 2254. In a separate written order, the Court denied Petitioner's incomplete application to proceed in forma pauperis and granted Petitioner an extension of time to submit a completed application or pay the \$5.00 filing fee within thirty days. The Court will DISMISS the instant petition with leave to amend as set forth below.

\\

\\

\\

\\

DISCUSSION

A. Standard of Review

A district court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

A district court shall “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are vague or conclusory, palpably incredible, or patently frivolous or false. See Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison, 431 U.S. 63, 75-76 (1977)).

B. Petitioner’s Claims

It appears from the petition that Petitioner challenges his 2005 parole revocation in San Benito Superior Court. However, Petitioner states that he has a pending proceeding in the California Supreme Court. See Petition at 6. Petitioner also states that he is awaiting trial on the underlying proceeding. See Petition at 2.

Based on the information in the instant petition, it appears that Petitioner has a pending state court action regarding the underlying parole revocation. Additionally, the Court cannot determine whether Petitioner has exhausted his claims in the California courts before filing this habeas action.

Prisoners in state custody who wish to challenge collaterally in federal habeas corpus proceedings either the fact or length of their confinement are first required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. 28 U.S.C. § 2254(b)-(c); see also O’Sullivan v Boerckel, 119 S.Ct 1728, 1730 (1999) (state’s highest court must be given opportunity to rule on claims even if review is discretionary); Larche v Simons,

53 F.3d 1068, 1071-72 (9th Cir. 1995) (Supreme Court of California must be given at least one opportunity to review state prisoners' federal claims). The exhaustion requirement applicable to federal habeas petitions is not satisfied if there is a pending post-conviction proceeding in state court. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983). If, for example, an appeal of a state criminal conviction is pending, a would-be federal habeas petitioner must await the outcome of his appeal before his state remedies are exhausted, even where the issue raised in the petition has been finally settled in the state courts. Id. Therefore, Petitioner cannot present claims to this Court which he has not first raised in the highest state court available, the Supreme Court of California, usually by direct appeal or by way of a state habeas petition.

The Court cannot fairly evaluate the petition in its present state. Accordingly, the Court will allow Petitioner an opportunity to file an amended petition on the Court's habeas form to correct these deficiencies. Petitioner must clearly state his grounds for relief and what conviction he wishes to challenge. He must explain whether he has a pending state court action and whether he has exhausted his claims, that is, what he did to present them first to the highest state court available, which is the Supreme Court of California.

CONCLUSION

1. The instant petition is **DISMISSED** with leave to amend within **thirty (30) days** from the date of this order. The amended petition must include the caption and civil case number used in this order (C 06-5560 JF (PR)) and the words "AMENDED PETITION" on the first page. The amended petition shall be on the Court's form for habeas petitions, **a copy of which is enclosed with Petitioner's copy of this order.**

Petitioner shall clearly state his grounds for relief challenging his 2005 parole revocation. He must explain whether there is a pending state court proceeding in his parole revocation and include whether he has exhausted his claims, that is, what he did to present them first to the highest state court available, which is the Supreme Court of California.

1 2. It is Petitioner's responsibility to prosecute this case. Petitioner must keep
2 the Court informed of any change of address and must comply with the Court's orders in
3 a timely fashion. Failure to do so may result in the dismissal of this action for failure to
4 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

5 IT IS SO ORDERED.

6 DATED: 3/1/07


JEREMY FOGEL
United States District Judge

1 A copy of this ruling was mailed to the following:

2 Carmen Roy Maldonado, Jr.
3 460 California Street, Apt # 9
4 Salinas, CA 93906
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28